Supreme Court, U.S.
FILED

No. _____

041627 JUN 1 - 2005

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# In The Supreme Court of the United States

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**GENE M. MUNSON,**

*Petitioner,*

**v.**

**CARLOS M. GUTIERREZ, SECRETARY, U.S. DEPARTMENT OF COMMERCE; U.S. PATENT AND TRADEMARK OFFICE,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Under Fed. R. Civ. P. 12(a), when the United States agency defendant failed to serve an answer to the complaint, did the defendant remain in default when the District Court for the District of Columbia *sua sponte* transferred the action to the District Court for the Eastern District of Virginia?

2. Did the Court of Appeals err, when it failed to review appealed interlocutory orders, along with the appealed final judgment of the District Court?

3. Under 29 U.S.C. § 633a and Fed. R. Civ. P. 56, did the Court of Appeals err, when it affirmed the grant of summary judgment by the District Court, which was based on involuntary use of annual leave not being adverse to a federal employee.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES AND REGULATIONS INVOLVED | 1 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE PETITION | 5 |
| I. Under Fed. R. Civ. P. 12(a), the District Court erred when it denied Plaintiff's Motion for the Clerk to Enter the Defendant's Default. | 5 |
| II. The Court of Appeals did err, when it failed to review appealed interlocutory orders, along with the appealed final judgment of the District Court. | 7 |
| III. Under 29 U.S.C. § 633a and Fed. R. Civ. P. 56, the Court of Appeals did err, when it affirmed the grant of summary judgment by the District Court, which was based on involuntary use of annual leave not being adverse to a federal employee. | 8 |
| CONCLUSION | 12 |
| APPENDIX A | 1a |
| APPENDIX B | 3a |
| APPENDIX C | 14a |
| APPENDIX D | 16a |
| APPENDIX E | 18a |

## TABLE OF AUTHORITIES

**Cases** **Page**

*Anderson v. Liberty Lobby, Inc.*,
477 U.S. 242 (1986) ..... 9-12
*Augusta Fiberglass Coatings v. Fordor Contracting*,
843 F.2d 808 (4th Cir. 1988) ..... 6
*Celotex Corp. v. Catrett*,
477 U.S. 317 (1986) ..... 9-12
*Consolidated Masonry & Fireproofing v. Wagman Construction Corp.*,
383 F.2d 249 (4th Cir. 1967) ..... 6
*General Dynamics Land Systems, Inc. v. Cline*,
540 U.S. ___, slip opinion (2/24/2004) ..... 8
*O'Connor v. Consolidated Coin Caterers Corp.*,
517 U.S. 308 (1996) ..... 8-9
*Smith v. City of Jackson*,
544 U.S. ___, slip opinion (3/30/2005) ..... 8
*Swierkiewicz v. Sorema N.A.*,
534 U.S. 506 (2002) ..... 9
*Town and County Kids v. Protected Venture*,
178 F.R.D. 453 (E.D.Va. 1998) ..... 6

**Statutes and Regulations**

28 U.S.C. § 1254 ..... 1
28 U.S.C. § 1391(e) ..... 7
28 U.S.C. § 1404(a) ..... 3
28 U.S.C. § 1406(a) ..... 3
29 U.S.C. § 633a ..... 1, 3, 7-9, 11
31 U.S.C. § 1342 ..... 1, 10
Fed. R. Civ. P. 8 ..... 9
Fed. R. Civ. P. 12 ..... 2, 5-7, 9
Fed. R. Civ. P. 55 ..... 6
Fed. R. Civ. P. 56 ..... 2, 8-11

## IN THE

## SUPREME COURT OF THE UNITED STATES

## PETITION FOR A WRIT OF CERTIORARI

Gene M. Munson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals in case No. 04-2477 appears at Appendix A.

## JURISDICTION

The judgment of the court of appeals was entered on March 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Under **29 U.S.C. § 633a:**

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of title 5 . . . shall be made free from any discrimination based on age.

Under **31 U.S.C. § 1342:**

> An officer or employee of the United States Government or of the District of Columbia Government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for

> emergencies involving the safety of human life or the protection of property.

Under **Fed. R. Civ. P. 12(a)(3):**

> The United States or an officer or agency thereof shall serve an answer to the complaint . . . within 60 days after the service upon the United States Attorney of the pleading in which the claim is asserted.

Under **Fed. R. Civ. P. 56(c):**

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

## STATEMENT

### 1. Underlying facts.

On the night of Monday, January 26, 1998, about 60 boxes (2 cubic foot size, 23 inches by 15 inches by 12 inches) were moved by professional movers for Munson's office move, in the in the U. S. Patent and Trademark Office of the Department of Commerce. Munson asked his supervisor for the actual time spent by Munson moving/unpacking to be reported to official time code 090700. The supervisor allowed younger coworkers the actual time spent moving/unpacking to be reported to official time code 090700. The supervisor did not allow the actual time Munson spent unpacking to be reported to official time code 090700. The supervisor required Munson to unpack the boxes. In February 1998, Munson spent 73 hours annual leave unpacking, which was not voluntary.

On June 12, 1998, Munson filed a complaint of discrimination with the Department of Commerce. On March 15, 1999, the Department of Commerce accepted the complaint. On November 18, 1999, the Department of Commerce issued the final decision, which held there was no discrimination. On November 19, 1999, Munson received the final decision.

On December 17, 1999, Munson filed an appeal to the U.S. Equal Employment Opportunity Commission (EEOC). On August 6, 2002, the decision of the EEOC on this matter was entered. On August 9, 2002, Munson received the decision of the EEOC.

**2. Proceedings in the District Court for the District of Columbia.**

On October 30, 2002, Munson filed a complaint in the United States District Court for the District of Columbia with the Secretary of the U.S. Department of Commerce as the defendant, Civil Action No. 02-2131. The relief sought in the action was: (1) withdraw the memorandum of concern received by plaintiff on March 17, 1998; (2) restore 73 hours annual leave spent by plaintiff moving/unpacking in February 1998 with those 73 hours converted to move time code 090700. The jurisdiction of the District Court was invoked under 29 U.S.C. § 633a.

On February 13, 2003, the summonses were served on the defendant, by certified mail, with return receipt. On March 14, 2003, Munson filed affidavits of service with the District Court. The return receipts indicated dates of delivery of February 21, 2003, to the U.S. Attorney, and February 19, 2003, to the U.S. Attorney General and to Donald L. Evans, Secretary, U.S. Dept. of Commerce. Defendant did not file an answer or motion for transfer. On September 11, 2003, the District Court *sua sponte* transferred the action to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. §§ 1404(a) and 1406(a).

Judge John Bates, in the footnote in the transfer order, noted that "no appearance has been entered or answer filed on defendant's behalf. The Court transfers this action without addressing any service or default issue." App. D. On December 31, 2003, the United States Court of Appeals for the District of Columbia Circuit denied the appeal from the order to transfer the action, *In re: Gene M. Munson*, No. 03-5275. In February 2004, the case file was sent to the Eastern District of Virginia, and there became Civil Action No. 04-181.

**3. Proceedings in the District Court for the Eastern District of Virginia.**

On March 19, 2004, Judge Gerald Bruce Lee of the Eastern District ordered: "All parties shall file an answer within twenty (20) days." On April 6, 2004, the defendant served an answer over one year after the defendant had received the complaint.

On May 4, 2004, the District Court denied Plaintiff's Motion for the Clerk to Enter the Defendant's Default. App. C. On May 15, 2004, the District Court denied Plaintiff's Motion for Certification of Interlocutory Appeal. On July 16, 2004, the District Court *sua sponte* substituted the Director of the U.S. Patent and Trademark Office as the proper defendant in the action and denied Plaintiff's Motion to Hold Venue is Proper in the District of Columbia. On September 27, 2004, the District Court entered summary judgment in favor of Defendant in the action. App. B.

**4. Proceedings in the Court of Appeals.**

On November 23, 2004, Munson filed an appeal to the court of appeals from the District Court orders dated May 4, July 16 and September 27, 2004. App. E. On March 4, 2005, the court of appeals entered its judgment that affirmed

the summary judgment entered by the District Court on September 27, 2004. App. A.

## REASONS FOR GRANTING THE PETITION

### I. Under Fed. R. Civ. P. 12(a), the District Court erred when it denied Plaintiff's Motion for the Clerk to Enter the Defendant's Default.

There had been default by Defendant before the transfer of the action to the Eastern District and before the court order entered March 19, 2004, which order occurred **400 days** after the service of the complaint. Since **April 2003**, there had been default by Defendant, because Defendant failed to serve an answer pursuant to Fed. R. Civ. P. 12(a), or serve a motion for transfer pursuant to Fed. R. Civ. P. 12, within **60 days** after the service of the complaint in February 2003. In the District Court order dated September 11, 2003, Judge John Bates noted that "no appearance has been entered or answer filed on defendant's behalf. The Court transfers this action without addressing any service or default issue." App. 16a. If Defendant had timely filed a motion for transfer, then there would have been no default. But that did not happen. Instead, on September 11, 2003, the District Court for D.C. *sua sponte* transferred the action to the District Court for the Eastern District of Virginia.

Neither the transfer of the action to Virginia nor the order, entered March 19, 2004, could abrogate Defendant's default. The Order, entered May 4, 2004 (App. C), cited no provision in the Federal Rules of Civil Procedure that authorizes the District Court to warrant the Defendant to serve an answer within **420 days** after the service of the complaint in February 2003, which would supersede Fed. R. Civ. P. 12(a) and abrogate Defendant's default. Absent such provision, as a matter of law, the court order entered March 19, 2004 could not warrant Defendant to serve an answer within **420 days** after the service of the complaint, that would supersede

Fed. R. Civ. P. 12(a) and abrogate Defendant's default. Entry of Defendant's default under Fed. R. Civ. P. 55 is proper, because Defendant waited **over one year**, until after the court order entered March 19, 2004, before Defendant filed an answer to the complaint that Defendant had received. Defendant need not have waited. Although, on March 19, 2004, the District Court could order all parties to file an answer, Defendant's answer could not abrogate Defendant's default, because the order could not supersede Fed. R. Civ. P. 12(a), which required the defendant to file an answer within **60 days** after the service of the complaint, rather than **420 days**, to avoid default.

Under Fed. R. Civ. P. 55(c), for good cause shown, the District Court may set aside an entry of default. However, Defendant had denied default and hence never made any attempt whatsoever to show good cause for the default. Moreover, any attempt appears fruitless, because Defendant waited **over one year**, until after the court order entered March 19, 2004, before Defendant filed an answer to the complaint that Defendant had received. Defendant need not have waited. *See Augusta Fiberglass Coatings v. Fordor Contracting*, 843 F.2d 808, 811 (4th Cir. 1988) (Although the defendant "clearly had a meritorious defense, we held that it had failed to show excusable neglect, or any excuse at all, for its failure to answer; therefore it was not entitled to relief" from a default judgment); *Consolidated Masonry & Fireproofing v. Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) ("In this case the defendant did not act promptly. . . . after more than two and one-half months had elapsed."); *Town and County Kids v. Protected Venture*, 178 F.R.D. 453, 454 n.3 (E.D.Va. 1998) (Defendants "have not shown good cause to set aside the entry of default." It is also worth noting in this regard that "defendants do not offer any justification for their failure to file a timely answer or other responsive pleading as required by Rule 12, Fed.R.Civ.P.").

Therefore, under Fed. R. Civ. P. 12(a), when the Defendant failed to serve an answer to the complaint, the

Defendant did remain in default when the District Court for the District of Columbia *sua sponte* transferred the action to the District Court for the Eastern District of Virginia. Hence, the District Court for the Eastern District of Virginia should have directed that the Clerk enter the Defendant's default. Then there could be proceedings upon the Defendant's default. The court of appeals has allowed the District Court to depart from the accepted and usual course of judicial proceedings pursuant to Fed. R. Civ. P. 12(a).

**II. The Court of Appeals did err, when it failed to review appealed interlocutory orders, along with the appealed final judgment of the District Court.**

The District Court orders dated May 4, July 16 and September 27, 2004 were appealed to the court of appeals. App. E. The interlocutory order dated May 4, 2004 involved a question of law under Fed. R. Civ. P. 12(a), noted *supra* at 5-7. The interlocutory order dated July 16, 2004 involved questions of law under 29 U.S.C. § 633a and 28 U.S.C. § 1391(e), namely whether (1) the Secretary of the U.S. Department of Commerce is a proper defendant in the action as head of the agency, and (2) venue is proper for the action in the District of Columbia when a defendant is the Secretary of the U.S. Department of Commerce.

The court of appeals should have reviewed the District Court orders dated May 4 and July 16, 2004. The court of appeals did err, when it failed to review the appealed interlocutory orders, because it departed from the accepted and usual course of judicial proceedings to review orders that have been appealed. App. A.

**III. Under 29 U.S.C. § 633a and Fed. R. Civ. P. 56, the Court of Appeals did err, when it affirmed the grant of summary judgment by the District Court, which was based on involuntary use of annual leave not being adverse to a federal employee.**

Under **29 U.S.C. § 633a:**

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of title 5 . . . shall be made free from any discrimination based on age.

Under 29 U.S.C. § 633a, Plaintiff must first establish a *prima facie* case that the personnel actions were not "made free from any discrimination based on age." *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-312 (1996) (*O'Connor*). The disparate-impact theory of recovery is available under discrimination based on age. *Smith v. City of Jackson*, 544 U.S. ___, slip opinion (March 30, 2005). For this *prima facie* case, in this action, Munson needs to show that Munson was at least 40 years of age, that younger coworkers were allowed reasonable time to pack and unpack boxes, and that the Defendant did not allow Munson reasonable time, the actual time. An agency may favor an older employee over a younger one, but not vice-versa. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S.___, slip opinion 18 (February 24, 2004) (the ADEA "does not mean to stop an employer from favoring an older employee over a younger one"). For *age* discrimination, while age difference may be material, whether or not *younger* coworkers of Munson are 40 years of age or older is irrelevant. *O'Connor*, 517 U.S. at 312 (there can be no greater inference of *age* discrimination when a 39-year-old is favored over a 40-year-old than when a 40-year-old is favored over a 56-year-old). Thus, 29 U.S.C. § 633a does not ban discrimination against employees because they are at

least 40 years of age; it bans any discrimination based on age against employees, but limits the protected class to those employees who are at least 40 years of age. *O'Connor*, 517 U.S. at 312.

**Standard of Review Under Fed. R. Civ. P. 12(b)(6)**

To survive a motion to dismiss, an employment discrimination complaint "must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 515 (2002) ("we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination").

**Standard of Review Under Fed. R. Civ. P. 56**

Fed. R. Civ. P. 56(c) provides that summary judgment shall be rendered if "there is no *genuine* issue as to *any material* fact and that the moving party is entitled to a judgment as a matter of law." (emphasis added). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (*Anderson*); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986) (*Celotex Corp.*).

At the summary judgment stage "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. . . . The inquiry performed is the threshold inquiry of determining whether there is a need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 249-250. "The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

At the summary judgment stage, the nonmoving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses." *Celotex Corp.*, 477 U.S. at 324.

The movant "must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. . . . A plaintiff . . . must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit."

"Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without somehow showing that the named witness' possible testimony raises no genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 328 (Justice White, concurring).

**A. Under 31 U.S.C. § 1342, Defendant could not accept voluntary work by Munson on annual leave.**

Under 31 U.S.C. § 1342, as a matter of law, in February 1998, the supervisor could not accept voluntary work by Munson to unpack boxes on annual leave. Hence, the supervisor should have allowed the actual time spent by Munson moving/unpacking to be reported to official time code 090700. The supervisor allowed younger coworkers the actual time spent moving/unpacking to be reported to official time code 090700.

**B. The District Court was arbitrary and capricious, because the order did not consider 73 hours annual leave spent by Munson moving/unpacking in February 1998 as adverse to Munson.**

Contrary to the District Court order (App. 9a), loss of 73 hours of annual leave clearly has had an adverse effect on employment conditions and benefits. Thus, Munson did indeed plead that he was subjected to an adverse employment action. When in February 1998, his supervisor did not allow the actual time Munson spent unpacking to be reported to official time code 090700, that was a personnel action that affected Munson under 29 U.S.C. § 633a. Since his supervisor allowed younger coworkers the actual time spent moving/unpacking to be reported to official time code 090700, the personnel action that affected Munson was not "made free from any discrimination based on age." 29 U.S.C. § 633a.

**C. The District Court relied on material facts in dispute.**

At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249-250. Thus, instead at trial, the District Court would weigh the evidence and determine the truth of the matter of the material facts in dispute. The District Court erred when it ignored Plaintiff's Exhibits. Since Munson named witnesses to support his claim, "summary judgment should not be granted without somehow showing that the named witness' possible testimony raises no genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 328 (Justice White, concurring).

Contrary to Fed. R. Civ. P. 56(c), the order (App. 7a, 9a-11a) relied on *material* facts with *genuine* issue in dispute, namely whether in February 1998 Munson did "request

additional move-time for the unpacking" (App. 10a), and thus whether the annual leave spent by Munson unpacking boxes was voluntary or not. At the summary judgment stage, the District Court should have accepted that the supervisor said that Munson must unpack the boxes and refused to allow Munson to take the time under official time code 090700 to do so. That left Munson to spend annual leave in order to unpack the boxes. The use of annual leave thereby was not voluntary. "The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

Thus, the court of appeals affirmance of the grant of summary judgment is contrary to *Anderson* and *Celotex Corp.*

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gene M. Munson, *Petitioner*
Post Office Box 2521
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25 May 2005

No. _____

# In The Supreme Court of the United States

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**GENE M. MUNSON,**

*Petitioner,*

**v.**

**CARLOS M. GUTIERREZ, SECRETARY, U.S. DEPARTMENT OF COMMERCE; U.S. PATENT AND TRADEMARK OFFICE,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## APPENDIX

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**APPENDIX A**

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 04 – 2477**

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GENE M. MUNSON,

Plaintiff – Appellant,

versus

DONALD L. EVANS, Secretary, U.S. Department of Commerce; UNITED STATES PATENT & TRADEMARK OFFICE,

Defendants – Appellees.

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Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Gerald Bruce Lee, District Judge (CA-04-181)

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Submitted: February 24, 2005 Decided: March 4, 2005

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Before NIEMEYER, WILLIAMS, and KING, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Gene M. Munson, Appellant Pro Se. Richard Parker, Rachel Celia Ballow, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Gene M. Munson appeals the district court's order granting summary judgment in favor of the Appellees in his employee discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Munson v. Evans, No. CA-04-181 (E. D. Va. Sept. 27, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

GENE M. MUNSON
Plaintiff,
v. Case No. 1:04cv181 (GBL)
DONALD L. EVANS,
SECRETARY
U.S. DEPARTMENT OF COMMERCE
Defendant.

**ORDER**

THIS MATTER is before the Court on Defendant Donald L. Evans', Secretary of the United States Department of Commerce, Motion to Dismiss or, in the Alternative, for Summary Judgment pursuant to Rule 12(b)(6) and Rule 56. It is hereby

ORDERED that summary judgment is GRANTED for the Defendant.

The Clerk is directed to enter judgment in favor of Defendant pursuant to Rule 58 of the Federal Rules of Civil Procedure.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 27th day of September, 2004.

s/ signature illegible
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
09/27/04

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

GENE M. MUNSON
Plaintiff,
v. Case No. 1:04cv181 (GBL)
DONALD L. EVANS,
SECRETARY
U.S. DEPARTMENT OF COMMERCE
Defendant.

**MEMORANDUM ORDER**

This Matter is before the Court on Defendant Donald L. Evans', Secretary of the United States Department of Commerce, Motion to Dismiss or, in the Alternative, for Summary Judgment pursuant to Rule 12(b)(6) and Rule 56. This is an age discrimination case. Plaintiff Gene M. Munson, a patent examiner, complains that his employer, the United States Patent and Trademark Office, took discriminatory action against him because his supervisor "did not allow [him] a reasonable amount of time to pack and unpack boxes . . . while younger workers were allowed a reasonable time . . ." Comp. ¶4. Munson, age 58 was instructed to pack his office for a scheduled office move and he did not pack his office as directed. The issue presented is whether Plaintiff has demonstrated he has suffered an "adverse employment action" where the supervisor's "Memorandum of Concern" states that "this letter is not a disciplinary action," and the letter did not result in any diminution in plaintiffs' pay, title, responsibilities, or any change to any other condition of employment. Because the Court concludes that the Memorandum of Concern is not a legally cognizable adverse employment action, there is no

genuine issue of fact for trial and Defendant's Motion for Summary Judgment is granted.

## I. Background

Plaintiff Gene M. Munson, a patent examiner, complains that his employer, the United States Patent and Trademark Office ("USPTO") has discriminated against him on the basis of age. On May 17, 1998, Supervisory Patent Examiner ("SPE") Tom Thomas issued Plaintiff a "Memorandum of Concern," noting that Plaintiff's failure to be packed and ready to move his office on his scheduled move date, was disruptive and constituted a failure to follow supervisory instructions. The Memorandum of Concern had no impact on Plaintiff's compensation, title or any other condition of his employment. In fact, the memorandum specifically states that it was not a disciplinary action. DEX-6. Munson asserts that the Memorandum of Concern was an act of age discrimination because it was a reprimand for not packing the boxes fast enough. Comp. ¶19.

The Memorandum was meant to notify Plaintiff what was expected of him and make Plaintiff aware of the impact on the move coordinator (Ed Westin) who stayed to complete Plaintiff's packing for him. DEX-3. Munson does not allege any discriminatory comments by SPE Tom Thomas at the time of the move or the days after. DEP 146-8. He does not know, and has not checked to determine if the memorandum is in his official file. DEP 41, 143-5. In the same month of March 1998, Plaintiff received his in-grade pay increase from a GS-14 Step 9 to a Step 10. DEP 49-50, 155. The only damage alleged as a result of the March 1998 Memorandum of Concern is that Plaintiff believes he was libeled.

Munson's colleagues had their offices packed and ready for the move without complaint. SPE Thomas considered it critical that everything was timely packed since

contract movers came in after duty hours to move everything to the new location. DEX-3.

Munson has been a Patent Examiner with the USPTO since 1974, and is currently a Primary Examiner GS-14, in the Electrical Discipline, within an Art Unit encompassing semiconductor technology. There are between 10 and 15 Patent Examiners within his Art Unit. Comp. ¶5; DEP 8, 19-20, 24. Supervisory Patent Examiner ("SPE") Tom Thomas became Munson's supervisor in 1997. In 1998, SPE Tom Thomas was over 40 years of age. DEP 109, 120; DEX-3.

Munson is a union representative for the Patent Office Professional Association (POPA") for members throughout USPTO and has served on the executive board for the last ten years. Participation in union activities as a USPTO employee is voluntary. DEP 22-3, 28.

In January 1998, Plaintiff's office contained material for about 60 boxes, 2 cubic feet in size. His office was 150 square feet. Comp. ¶9; DEP 55. In his office Munson maintained paperwork for union grievances he was working as a representative or co- representative, those grievances completed, and POPA committee materials. The union materials were mostly in foot high piles on two desks, bookcases, a table and under a table. DEP 55-6. Munson's office also contained patent applications he was working on, those he was later planning to work on, as well as papers from prior patent applications dating back to 1974. Of the approximately 60 boxes in plaintiff's office, he estimated that not less than 15 and perhaps as many as 35 to 50 were comprised solely of his POPA union materials. DEP 67-8.

Plaintiff was scheduled to move his office on Monday, January 26th. Under his split schedule, Monday was his regular day off. DEP 69-70. At the close of business on Friday, January 23rd, Plaintiff had only packed about 20 boxes. Plaintiff failed to inform his supervisor that he would not have his office packed in time, or that, because of his age, he was physically unable to pack his boxes. DEP 150-1.

Plaintiff decided to come to the office on Monday. He was still packing at 5:30 p.m. At 6:30 p.m. there was about seven boxes left to be packed. Munson left a little after 6:30 p.m., concluding that his move date would be changed to Tuesday. When plaintiff came to his office the next day, he found that the packing was completed and that he was moved. Comp. ¶15; DEP 82.

Pursuant to a 1997 agreement between the PTO, Department of Commerce, and POPA, the actual time spent by an examiner packing and unpacking boxes in an office move was to be reported to official time code 090700. Comp. ¶7. SPE Tom Thomas informed plaintiff that since most of the boxes contained POPA materials, plaintiff could take union time for the packing and unpacking. Plaintiff reported a total of 26 hours in that time period for the move; nine hours under official time move code 09700 and seventeen hours as paid union time. DEP 93. SPE Thomas noted that in the art unit, one examiner received four hours of move time, five received eight hours of move-time, and one received fifteen hours of move-time. DEX-5. Plaintiff never asked for help in unpacking his boxes. DEP 102.

On February 20, 1998, plaintiff reported and was charged 73 hours annual leave rather than move time under code 09700 to unpack boxes containing union materials. Comp. ¶18; DEP 102-3. SPE Tom Thomas did not direct plaintiff to use his annual leave for the unpacking. DEX-3.

## II. Discussion

### A. Standard of Review

Under Rule 56(c), the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the Court views the facts in alight most favorable to the non-moving party.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 474, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1996). "Rule 56(e) requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

**B. Analysis**

The Court holds that Plaintiff has failed to provide any evidence that he was subject to an "adverse employment action." As a result, Plaintiff fails to state a prima facie case of age discrimination under the burden shifting scheme of *McDonnell Douglas*. Therefore, the Court GRANTS Defendants' Motion for Summary Judgment.

**A. The Prima Facie Case of Disparate Treatment**

Plaintiff fails to establish a prima facie case of disparate treatment. To state a prima facie claim of discrimination, a plaintiff must offer proof of the following elements: (1) that he is a member of a protected class; (2) he was subjected to an adverse employment action, and (3) that circumstances surrounding the employment action rationally support the inference that the adverse employment action was motivated by unlawful considerations. *See Ennis v. National Ass'n of Business and Educ. Radio Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). In this case, Plaintiff fails to establish that he suffered a prima facie case of disparate treatment because

he does not provide any evidence that he was subjected to adverse employment action.

**1. Adverse Employment Action**

To state a prima facie claim of discrimination, the plaintiff must identify an act of discrimination as well as some evidence that the alleged act of discrimination resulted in an "adverse employment action." *Bristow v. Dailey Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). The Fourth Circuit has held that the term "adverse employment action" "include[s] any retaliatory act or harassment if, and only if, that act or harassment results in an adverse effect on the effect on the 'terms, conditions, or benefits' of employment." *Von Gunton v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (quoting *Mundy v. Waste Mgmt.*, 126 F.3d at 243 (4th Cir. 1997). An oral reprimand or letter of reprimand may constitute an adverse employment action, but only if it adversely affects the terms and conditions of employment. *See Chicka v. Planning Research Corp.*, 179 F.Supp. 2d 575, 587 (D. Md. 2002). In this case, the Memorandum of Concern issued to Plaintiff does not constitute an adverse employment action. It did not result in any kind of discipline. The memorandum had no effect on the terms and conditions of Plaintiff's employment. In addition, Plaintiff's own decision to use his annual leave is not an adverse action. In fact, in the same month, that Munson was issued the Memorandum of Concern he received his in-grade step increase to GS-14 Step 10. Plaintiff has failed to plead and prove that he was subjected to an adverse employment action.

**2. Circumstances Surrounding the Issuance of the Memorandum of Concern.**

Plaintiff also fails to establish that circumstances surrounding the issuance of the Memorandum of Concern or

his voluntary use of annual leave rationally support any inference that the actions were motivated by Plaintiff's age. In order to establish a prima facie case of disparate treatment, Plaintiff must provide evidence to establish that circumstances surrounding the employment action rationally support the inference that the adverse employment action was motivated by unlawful considerations. *See Ennis*, 53 F.3d at 58. In this case, there is no evidence that any decision by SPE Tom Thomas was because of discriminatory animus. There were no discriminatory comments by SPE Thomas about Munson's ability to pack or unpack boxes. Additionally, there is no evidence that Plaintiff was treated differently than any other employee under SPE Thomas' supervision. Plaintiff chose to submit his time sheet with 73 hours of annual leave. He did not ask SPE Tom Thomas for union time to unpack his boxes, did not ask for assistance with unpacking, and did not request additional move-time for the unpacking. He reported twenty-six hours move time and union time and received it. He also received his in-grade promotion concurrent in time with the Memorandum of Concern. Plaintiff provides no evidence that the Memorandum of Concern was issued because of his age.

Plaintiff fails to establish a prima facie case of disparate treatment because he provides no evidence of an adverse employment action and he does not allege any facts that support the inference that the memorandum of concern was motivated by unlawful considerations. Accordingly, his complaint fails to state a cause of action upon which relief may be granted and must be dismissed.

**3. Pretext for Discrimination**

Even assuming *arguendo* that Plaintiff could establish a prima facie case, he cannot demonstrate the Defendant's proffered reasons for issuing the Memorandum of Concern was a pretext for discrimination. Once plaintiff establishes a prima facie case, the defendant must produce

evidence of a non-discriminatory reason for the disciplinary measure. *See Reeves*, 530 U.S. at 142-43 (2000); see also McDonnell Douglas Corp., 375 F.3d 1182. If the defendant meets that burden of production, to prevail on the claim, the plaintiff must demonstrate the existence of a genuine issue of fact for trial that the defendant's reason is a mere pretext for discrimination. *See Reeves*, 530 U.S. at 143.

SPE Thomas's stated non-discriminatory reason for the issuance of the Memorandum of Concern is that Munson failed to meet office move deadlines and demonstrated a failure to follow supervisory instructions. In support of his assertion that SPE Thomas was motivated by discriminatory animus, Plaintiff cites that his younger co-workers had fewer boxes to pack than plaintiff did and they were allowed more time under the moving code per box to pack or unpack than plaintiff. Comp. ¶16-17. There is no evidence that a discriminatory reason motivated SPE Thomas or that his stated reason for issuing the memorandum was pretextual.

**4. Defamation**

Plaintiff's assertion that the Memorandum of Concern was libelous does not provide a basis to establish the existence of an adverse employment action. The Federal Torts Claims Act (FTCA), 28 U.S.C. § 2679(b)(1), waives the sovereign immunity of the United States for negligent or wrongful act or omission of any employee of the government while acting within the scope of his employment. By its terms, the FTCA provides the exclusive remedy in any civil action against the United States for injury caused by an employee while acting within the scope of his employment. Plaintiff's libel claim falls under the FTCA and cannot form the basis of a claim for disparate treatment.

Even assuming that Plaintiff had filed a timely FTCA action, which he has not, the court would not have subject matter jurisdiction over his defamation claim because it falls within the exceptions to the FTCA's limited waiver of

sovereign immunity contained in 28 U.S.C. § 2679(h). *Talbert v. United States*, 932 F.2d 1064, 1066 (4th 1991). Section 2680(h) specially exempts any claim arising out of libel, slander, misrepresentation, or deceit. *Talbert*, 932 F.2d at 1066. Therefore, Plaintiff's defamation claim would be barred and subject to dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction.

## CONCLUSION

In conclusion, Defendant's Motion for Summary Judgment is granted. Plaintiff cannot establish that he was subjected to an adverse employment action. Plaintiff also cannot establish that any circumstances rationally support any inference that actions taken by his supervisor were motivated by Plaintiff's age. Finally, even assuming that Plaintiff could established a prima facie case of age discrimination, he has not established that Defendant's proffered reasons for issuing the Memorandum of Concern were a pretext for discrimination.

## III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that summary judgment is GRANTED for the Defendant.

The Clerk is directed to enter judgment in favor of Defendant pursuant to Rule 58 of the Federal Rules of Civil Procedure.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 27th day of September, 2004.

s/ signature illegible
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
09/27/04

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

GENE M. MUNSON
Plaintiff,
v. Case No. 1:04cv181
DONALD L. EVANS,
SECRETARY
U.S. DEPARTMENT OF COMMERCE
Defendant.

**ORDER**

THIS MATTER is before the Court on Plaintiff Gene M. Munson's Motion for Reconsideration of the Court Orders Filed April 14, 2004 and for the Clerk to Enter the Defendant's Default.

Plaintiff's arguments in this motion mirror that of Plaintiff's Motion for Reconsideration of the Court Order Filed March 19, 2004 and for Entry of Judgment by Default, which was addressed and denied in the Court's order dated April 14, 2004. Therefore, for the reasons stated in this Court's order dated April 14, 2004, it is hereby ORDERED that Plaintiff's Motion for Reconsideration of the Court Orders Filed April 14, 2004 and for the Clerk to Enter the Defendant's Default is DENIED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 4th day of May, 2004.

s/ signature illegible
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
05/04/04

## APPENDIX D

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

**GENE M. MUNSON,**
**Plaintiff,**
**v.** **Civil Action No. 02-2131 (JDB)**
**DONALD L. EVANS,**
**Secretary, U.S.**
**Department of Commerce**
**Defendant.**

## ORDER

This action was filed on October 30, 2002, alleging age discrimination based on certain events in 1998 relating to plaintiff's employment with the United States Patent and Trademark Office ("USPTO"). an earlier action by plaintiff alleging age discrimination relating to the denial of a promotion at USPTO in 1996 was transferred to the Eastern District of Virginia. See Munson v. Evans, Civil Action No. 02-0195 (JDB), Memorandum Opinion and Order dated Nov. 26, 2002, appeal denied, No. 03-5034 (D.C. Cir. Apr. 30, 2003). The reasoning of that decision is fully applicable to this case, which likewise must be transferred for improper venue.[1]

Accordingly, it is this 11th day of September, 2003, hereby

ORDERED that the above-captioned matter shall be

[1] The docket in this case reflects service on defendant in March 2003, although no appearance has been entered or answer filed on defendant's behalf. The Court transfers this case without addressing any service or default issue.

and hereby is TRANSFERRED to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. §§ 1404(a) and 1406(a).

/s/
JOHN D. BATES
United States District Judge

Copies to:

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3888 North 30th Street
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Mark E. Nagle, Chief
Civil Division
United States Attorney's Office
for the District of Columbia
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Washington, D.C. 20001

**APPENDIX E**

**FILED**
**2004 NOV 23 P 1:21**
**CLERK US DISTRICT COURT**
**ALEXANDRIA, VIRGINIA**

**UNITED STATES DISTICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

**Civil Action No. 04-181-A (GBL)**

**GENE M. MUNSON, Plaintiff**
**v.** **NOTICE OF APPEAL**
**JOHN W. DUDAS**
**UNDERSECRETARY OF COMMERCE**
**FOR INTELLECTUAL PROPERTY AND**
**DIRECTOR OF THE U.S. PATENT**
**AND TRADEMARK OFFICE, Defendant**

Notice is hereby given that Gene M. Munson, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 27th day of September, 2004, and from the interlocutory order which denied Plaintiff's Motion to Hold Venue is Proper in the District of Columbia and *sua sponte* substituted the Director of the U.S. Patent and Trademark Office as the proper defendant, entered in this action on the 16th day of July, 2004, and from the interlocutory order which denied Plaintiff's Motion for the Clerk to Enter the Defendant's Default, entered in this action on the 4th day of May, 2004.

s/ Gene M. Munson
GENE M. MUNSON
P.O. Box 2521
Arlington, Virginia 22202
(571) 272-1659

November 23, 2004

Clerk, mail copy to;

Rachel C. Ballow
Assistant United States Attorney
2100 Jamieson Ave.
Alexandria, Virginia 22314